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PROOF OF AGGRAVATION UNDER THE CALIFORNIA UNIFORM DETERMINATE SENTENCING ACT: THE CONSTITUTIONAL ISSUES

by Gerald F. Uelman*

I. INTRODUCTION: SENTENCING MODELS

Responding to criticism that the unbridled discretion of parole boards resulted in unacceptable disparities in the punishment meted out to similar offenders for similar crimes,¹ the California legislature enacted the Uniform Determinate Sentencing Act of 1976.² By presenting a narrow range of choices to the sentencing judge and creating explicit factual guidelines to control those choices, subject to appellate review, the Act promises greater consistency in sentencing results.³

The California Act confronts a judge who is sentencing a defendant to prison with three choices: a middle term, a lesser term when circumstances of mitigation are shown, and a greater term when circumstances of aggravation are shown.⁴ Aggravating and mitigating circumstances are described in rules adopted by the California Judicial Council.⁵ The judge must support his choice of the term with a state-

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1. See generally *Transcript of the Hearing on the Indeterminate Sentencing Law by the Senate Select Comm. on Penal Institutions*, Cal. Senate (1974).

2. Act of Sept. 20, 1976, ch. 1139, [1976] Cal. Stats. —, as amended by Act of June 29, 1977, ch. 165, [1977] Cal. Stats. —.

3. This approach is strikingly similar to the sentencing provisions of the Federal Criminal Code Reform Act of 1977 now pending in Congress. See S. 1437, 95th Cong., 1st Sess. (1977). See also G. Uelman, *Federal Sentencing Reform: The Emerging Constitutional Issues* (Sept. 17, 1977) (unpublished manuscript prepared for the Southwestern University Law Review First West Coast Conference on Constitutional Law, Sept. 17-18, 1977).

4. Act of June 29, 1977, ch. 165, § 15, [1977] Cal. Stats. — (to be codified in CAL. PENAL CODE § 1170(b)). See Oppenheim, *Computing a Determinate Sentence . . . New Math Hits the Courts*, 51 CAL. ST. B.J. 604 (1976).

5. CAL. RULES OF COURT 421, 423 (effective July 1, 1977).

ment of reasons, and the defendant may challenge that choice on appeal.

To illustrate the effect of these changes, we can compare a defendant convicted of armed robbery before and after the new law. Before the new law took effect, robbery was punishable by an indeterminate sentence of one year to life in prison; if the jury found the defendant was armed with a dangerous or deadly weapon, the possible sentence was five years to life in prison.⁶ The defendant convicted of ordinary robbery was eligible for parole after serving one year, but a defendant convicted of armed robbery had to serve one third of the five year minimum before being eligible for release on parole.⁷ The actual parole release date and length of the parole term were determined by the Adult Authority, based on a subjective judgment of the defendant's progress toward rehabilitation.⁸ Under the new law, armed robbery is no longer defined as a separate crime. Robbery is punishable by two, three or four years.⁹ Ordinarily, the three year term is imposed, unless aggravating circumstances are shown to justify the four year term, or mitigating circumstances are shown to justify the two year term.¹⁰ Among the aggravating circumstances which justify the four year term is proof that the defendant was armed.¹¹ Alternatively, the fact that the defendant was armed can be pleaded and proven as "enhancement," which also adds one year to the sentence to be served.¹² The defendant is not eligible for release on parole until he has served two-thirds of the sentence,¹³ and the parole term is ordinarily limited to one year.¹⁴

While these reforms may correct the most serious disparities in sentences, they inject procedural changes into the sentencing process which raise substantial issues of constitutional magnitude. If the sentencing judge is required to make new factual findings to justify the sentence, a whole panoply of procedural rights under the rubric of "due process" may apply, including the right to standards which are not "vague," adequate notice, confrontation and cross-examination of wit-

6. CAL. PENAL CODE §§ 211a, 213 (West 1970) (amended 1976).

7. *Id.* § 3049.

8. *Id.* § 3020.

9. Act of June 29, 1977, ch. 165, § 5, [1977] Cal. Stats. — (to be codified in CAL. PENAL CODE § 213).

10. *Id.* § 15 (to be codified in CAL. PENAL CODE § 1170(b)).

11. CAL. RULES OF COURT 421(a)(2) (effective July 1, 1977).

12. Act of June 29, 1977, ch. 165, § 91, [1977] Cal. Stats. — (to be codified in CAL. PENAL CODE § 12022).

13. *Id.* § 38 (to be codified in CAL. PENAL CODE § 2931(a)).

14. *Id.* § 42 (to be codified in CAL. PENAL CODE § 3000(a)).

nesses, the right to exclude unlawfully obtained evidence, proof beyond a reasonable doubt, a jury trial, explicit findings, and appellate review. The magnitude of the impact such changes could have upon the criminal justice system is great. While ten to fifteen per cent of California defendants now avail themselves of all of the procedural rights of a trial,¹⁵ all convicted defendants are ultimately subject to the sentencing process, including the eighty-five to ninety per cent who plead guilty. Even if the full array of due process rights is made available only to the twenty-eight per cent of felony defendants who receive prison or jail sentences,¹⁶ we face the possibility of a vast multiplication of the commitment of judicial resources to what is now a rather routine and expeditious process.

As the law has evolved thus far, two basic models of the sentencing process have emerged. The traditional model, which we can label the "discretion" model, gives the judge relatively free access to information for sentencing. In *Williams v. New York*,¹⁷ upholding the imposition of a death penalty on the basis of information contained in a pre-sentence report to the judge, the Court reasoned that "modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial."¹⁸ The Court did *not* hold that the sentencing process is immune from due process scrutiny, however, noting that the defendant was represented by counsel and was not deprived of an opportunity to present evidence.¹⁹ Only the rights to reasonable notice of the charges and to an opportunity to examine adverse witnesses were explicitly rejected.²⁰

The second model, which we will call the "enhancement" model, finds its paradigm in *Specht v. Patterson*.²¹ There the Court confronted a proceeding whereby a defendant convicted of indecent liberties, a crime carrying a maximum sentence of ten years, could be found to be a "threat of bodily harm to the public" or an "habitual offender" and given an indeterminate sentence of one day to life.²² The finding

15. See CAL. DEP'T OF JUSTICE, CRIME AND DELINQUENCY IN CALIFORNIA 32 (1975).

16. *Id.*

17. 337 U.S. 241 (1949).

18. *Id.* at 247.

19. *Id.* at 245 n.3.

20. *Id.* at 245, 250-52.

21. 386 U.S. 605 (1967).

22. Colorado Sex Offenders Act, COLO. REV. STAT. ANN. §§ 39-19-1 to -10 (1963) (repealed 1972).

was made on the basis of a psychiatric report submitted to the Court. Noting that the finding that the defendant was a public threat or habitual offender was a new finding of fact which was not an ingredient of the offense charged, the Court found the situation "radically different" from *Williams v. New York*.²³ This difference entitled the defendant to the "full panoply of the relevant protections which due process guarantees in state criminal proceedings,"²⁴ including "that he be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine, and to offer evidence of his own. And there must be findings adequate to make meaningful any appeal that is allowed."²⁵ The absence of a right to proof beyond a reasonable doubt and a jury trial from this catalogue of rights may simply be explained by noting that the cases holding these rights to be incorporated within due process had not yet been decided.²⁶

The essential difference between the "discretion" model and the "enhancement" model is the existence in the latter of an explicit factual predicate for punishment which was not an essential element of the underlying crime. But these two models are not mutually exclusive; it would be more accurate to characterize them as representing opposite ends of a spectrum. Due process is no longer the "all or none" proposition suggested in *Specht v. Patterson*. As stated by the Court more recently in *Morrissey v. Brewer*:

Once it is determined that due process applies, the question remains what process is due. It has been said so often by this Court and others as not to require citation of authority that due process is flexible and calls for such procedural protections as the particular situation demands.²⁷

The purpose of this paper is to review the major procedural protections encompassed within due process, and to consider their applicability to the sentencing aggravation procedures envisioned in the California statute. We will find that these procedures do not always fit comfortably into *either* the "discretion" or the "enhancement" models.

23. 386 U.S. at 608.

24. *Id.* at 609 (quoting *United States ex rel. Gerchman v. Maroney*, 355 F.2d 302, 312 (3d Cir. 1962)).

25. *Id.* at 610.

26. The right to jury trial was incorporated one year later, *Duncan v. Louisiana*, 391 U.S. 145 (1968), while incorporation of the right to proof beyond a reasonable doubt came three years later. *In re Winship*, 397 U.S. 358 (1970).

27. 408 U.S. 471, 481 (1972).

II. LEGISLATIVE PARALLELS

In seeking the answer to the question "what process is due," the ambiguous terrain we tread is not untrodden. At least two other legislative devices raise a similar galaxy of issues.

First, we have the death penalty statutes enacted in response to the holding in *Furman v. Georgia*²⁸ that a discretionary death penalty violates the eighth amendment's proscription of "cruel and unusual punishment." These statutes require the finding of specified "aggravating circumstances" to justify the imposition of a penalty of death. This separate factual finding may take these provisions outside the realm of *Williams v. New York*. Yet the enhancement model of *Specht v. Patterson* might be distinguished since the aggravating circumstances frequently bear a close relationship to the underlying crime. Nonetheless, each of the death penalty statutes subsequently upheld by the Supreme Court²⁹ provides an explicit list of aggravating circumstances,³⁰ an opportunity to confront and cross-examine adverse witnesses,³¹ proof beyond a reasonable doubt to a jury,³² and explicit factual findings which are subject to appellate review.³³ The statutes of Georgia and Texas also provide a defendant with advance notice of which aggravating circumstances are being relied upon.³⁴ In the one state where the judge is vested with discretion to disregard the jury's recommendation and impose a death penalty, the Court, in *Gardner*

28. 408 U.S. 238 (1971) (per curiam).

29. See *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976).

30. FLA. STAT. ANN. § 921.141(5) (West Supp. 1977); GA. CODE ANN. § 27-2534.1 (b) (Supp. 1976); TEX. PENAL CODE ANN. tit. 5, § 19.03 (Vernon 1974).

31. FLA. STAT. ANN. § 921.141(1) (West Supp. 1977); GA. CODE ANN. § 27-2503 (Supp. 1976); TEX. CODE CRIM. PROC. art. 37.071(a) (Vernon Supp. 1976-77).

32. FLA. STAT. ANN. § 921.141(1) (West Supp. 1977); GA. CODE ANN. § 27-2534.1 (c) (Supp. 1976); TEX. CODE CRIM. PROC. art. 37.071(c) (Vernon Supp. 1976-77). The jury, under Florida law, serves only in an advisory capacity in the sentencing process. However, if the jury recommends a life sentence, the judge may not impose the death penalty unless "the facts suggesting a sentence of death . . . [are] so clear and convincing that virtually no reasonable person could differ." *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975).

33. FLA. STAT. ANN. § 921.141(3), (4) (West Supp. 1977); GA. CODE ANN. §§ 27-2534.1(c), 27-2537 (Supp. 1976); TEX. CODE CRIM. PROC. art. 37.071(c), (f) (Vernon Supp. 1976-77).

34. GA. CODE ANN. § 27-2503(a) (Supp. 1976) provides that "only such evidence in aggravation as the state has made known to defendant prior to trial shall be admissible." TEX. PENAL CODE ANN. tit. 5, § 19.03 (Vernon 1974) makes the "aggravating circumstance" an element of crime which must be pleaded in the initial charge. *But cf.* FLA. STAT. ANN. § 921.141(1) (West Supp. 1977), which allows the court to consider evidence "as to any matter that the court deems relevant to the sentence."

v. Florida,³⁵ held that a presentence investigation report relied upon by the sentencing judge in such circumstances must be disclosed in its entirety to defense counsel, thus limiting its prior holding in *Williams v. New York*³⁶ to non-capital cases.

Similarly, the California death penalty law recently enacted over the governor's veto provides for a full array of due process protections.³⁷ A death penalty may not be imposed unless the jury finds that enumerated "special circumstances" were present,³⁸ and considers other evidence presented in aggravation.³⁹ Not only must the special circumstances be alleged and specifically found to be true beyond a reasonable doubt,⁴⁰ but no additional evidence in aggravation can be presented unless notice of the evidence to be introduced was given to the defendant before trial.⁴¹ The special circumstances must be proven by competent evidence, subject to the same opportunity to confront and cross-examine which applies at the trial.⁴²

A second parallel is the federal "dangerous special offender" sentencing provisions presented in the Organized Crime Control Act of 1970⁴³ and the Comprehensive Drug Abuse Prevention and Control Act of 1970.⁴⁴ Both provide that a defendant convicted of a felony may receive a sentence in excess of the normal maximum, up to a maximum of twenty-five years, upon a finding he is a "dangerous special offender."⁴⁵ The statutes specifically provide that a notice of the prosecutor's intent to rely upon the dangerous special offender provisions must be filed prior to trial, and that the defendant has a right to counsel, compulsory process, cross-examination, specific factual findings and appellate review of the determination that he is a dangerous special offender.⁴⁶ The statutes do, however, permit reliance upon hearsay in presentence reports, limited non-disclosure of such reports, and provide that the burden of proof is merely a preponderance of

35. 97 S. Ct. 1197, 1207 (1977).

36. See notes 17-20 *supra* and accompanying text.

37. Act of Aug. 11, 1977, ch. 316, [1977] Cal. Stats. —.

38. *Id.* § 9 (to be codified in CAL. PENAL CODE § 190.2).

39. *Id.* § 11 (to be codified in CAL. PENAL CODE § 190.3).

40. *Id.* § 12 (to be codified in CAL. PENAL CODE § 190.4(a)).

41. *Id.* § 11 (to be codified in CAL. PENAL CODE § 190.3).

42. *Id.* § 12 (to be codified in CAL. PENAL CODE § 190.4(a)). See CAL. EVID. CODE § 711 (West 1966).

43. 18 U.S.C. § 3575 (1970).

44. 21 U.S.C. § 849 (1970).

45. 18 U.S.C. § 3575(b) (1970); 21 U.S.C. § 849(b) (1970).

46. 18 U.S.C. §§ 3575(a)-(b), 3576 (1970); 21 U.S.C. § 849(a)-(b), (h) (1970).

the evidence, to be determined by a judge sitting without a jury.⁴⁷ This middle position was justified by the draftsmen by noting that "[t]he requirements of *Specht v. Patterson* . . . are inapplicable, since no separate charge triggered by an independent offense is at issue. Only circumstances of aggravation of the offense for which the conviction was obtained are before the court."⁴⁸

As we review each of the procedural rights in the due process panoply, it will be enlightening to compare the judicial treatment of these two legislative parallels.

III. REQUIREMENTS OF PROCEDURAL DUE PROCESS

A. *Defining Aggravating Circumstances: The Problem of Vagueness*

The task of defining circumstances of aggravation and mitigation under the California law was delegated by the legislature to the California Judicial Council, a body composed of representatives of all California courts.⁴⁹ Drafting reasonably detailed and explicit standards is a formidable undertaking, perhaps best done by an administrative body. Whether that administrative body should be a judicial one, however, raises an intriguing question of separation of powers, since the constitutionality of the standards adopted will ultimately be resolved by the courts.⁵⁰

The constitutional issues raised by the formulation of these standards are serious ones. The right to explicit definitions which are not vague is an essential of due process of law. Two rationales support this doctrine of vagueness: the lack of fair notice to potential defendants,⁵¹ and the danger of discriminatory application where the law is vague.⁵²

47. 18 U.S.C. § 3575(b) (1970); 21 U.S.C. § 849(b) (1970).

48. S. REP. NO. 91-617, 91st Cong., 1st Sess. 163-64 (1969) (citation omitted).

49. CAL. PENAL CODE § 1170.3 (West Supp. 1977).

50. See, e.g., the opinion of Justices Douglas and Black dissenting to the promulgation of the Rules of Procedure for the Trial of Minor Offenses before United States Magistrates, 27 L. Ed. 2d lvi, at lviii-lx (1971), as well as their opinion on the 1966 Amendments to the Federal Rules of Criminal Procedure. H.R. Doc. No. 390, 89th Cong., 2d Sess. 14 (1966).

The federal proposal would create an independent "United States Sentencing Commission" to define the "ranges" of punishment available. S. 1437 tit. II, § 991, 95th Cong., 1st Sess. (1977).

51. *Lanzetta v. New Jersey*, 306 U.S. 451 (1939).

52. *Grayned v. City of Rockford*, 408 U.S. 104 (1972); *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966). See also Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

While both rationales apply with greatest force to the definition of the crime itself, one cannot simply dismiss the vagueness doctrine as inapplicable to sentencing enhancement provisions. This much is now abundantly clear from the Supreme Court opinions considering the constitutionality of statutes defining the "aggravating circumstances" under which the death penalty may be imposed. The precision with which those circumstances were defined was of central concern to the Court. In *Gregg v. Georgia*,⁵³ for example, the Court carefully examined each of ten categories of aggravating circumstances in the Georgia statute in terms of vagueness or overbreadth. In the plurality opinion Justice Stewart noted with approval that the Georgia Supreme Court, in *Arnold v. State*,⁵⁴ had already declared one statutory ground for capital punishment unconstitutionally vague, and had narrowly construed other grounds.⁵⁵

The *Arnold* opinion is instructive for our purposes. The Georgia Supreme Court was confronted with a defendant sentenced to death upon the jury's finding of one aggravating circumstance: "[t]he offense . . . was committed by a person . . . who . . . [had] a substantial history of serious assaultive criminal convictions."⁵⁶ Citing *Grayned v. City of Rockford*,⁵⁷ the court noted that "[w]henver a statute leaves too much room for personal whim and subjective decision-making without a readily ascertainable standard or minimal, objective guidelines for its application, it cannot withstand constitutional scrutiny."⁵⁸ Applying this standard, the Georgia court found the term "substantial history" unconstitutionally vague, concluding, "While we might be more willing to find such language sufficient in another context, the fact that we are here concerned with the imposition of a death sentence compels a different result."⁵⁹

The conclusion that the vagueness doctrine applies to sentence enhancement provisions does not, of course, mean that it applies with the same force as when the doctrine is applied to definitions of crime. The doctrine has always been applied with varying degrees of strictness, depending upon the context. The strictest application has always been reserved for cases where first amendment liberties were at stake.⁶⁰

53. 428 U.S. 153 (1976) (opinion of Stewart, J.).

54. 236 Ga. 534, 224 S.E.2d 386 (1976).

55. *Gregg v. Georgia*, 428 U.S. 153, 166 n.9, 201-03 (1976) (opinion of Stewart, J.).

56. GA. CODE ANN. § 27-2534.1(b)(1) (Supp. 1976).

57. 408 U.S. 104 (1972).

58. *Arnold v. State*, 236 Ga. 534, 541, 224 S.E.2d 386, 391 (1976).

59. *Id.* at 542, 224 S.E.2d at 392.

60. *Smith v. California*, 361 U.S. 147, 150-51 (1959).

Similarly, a higher standard of strictness is recognized where the statute defines the availability of capital punishment.⁶¹ At the other end of the spectrum are cases suggesting "greater leeway" with respect to "regulatory statutes governing business activities."⁶² This variable standard is consistent with the Supreme Court's interpretation of the standards of procedural due process.

Thus, the first step in applying the constitutional test of vagueness to definitions of aggravating circumstances is to ascertain the *extent* of aggravation permitted. The extent of aggravation should not, however, be measured in purely quantitative terms: the real issue is one of proportion. For example, the aggravation of a two year sentence to a three year sentence under the California law permits a fifty per cent increase in the punishment being meted out; at the other end of the spectrum, adding one year to a six year sentence is an increase of less than seventeen per cent. This distinction was not lost on the draftsmen of the dangerous special offender provisions contained in current federal law. The increased sentence permitted upon a finding that the defendant is a dangerous special offender is limited to a term "not disproportionate in severity to the maximum term otherwise authorized by law."⁶³ Apparently, this limitation was intended as an end-run around *Specht v. Patterson*, in the belief *Specht* only applies where a separate charge triggered by an independent offense is at issue. The proportionality limitation was designed to insure that the increased sentence did not represent a penalty for a different crime. At least one court was persuaded by this argument,⁶⁴ although it contradicts the following rather specific language in *Specht*:

The Sex Offenders Act does not make the commission of a specified crime the basis for sentencing. It makes one conviction the basis for commencing another proceeding under another act to determine whether a person constitutes a threat of bodily harm to the public, or is an habitual offender and mentally ill. This is a new finding of fact that was not an ingredient of the offense charged.⁶⁵

A persuasive argument can be made that, even if *Specht* is limited to a separate offense, whether the aggravating circumstance states a

61. *Arnold v. State*, 236 Ga. 534, 542, 224 S.E.2d 386, 392 (1976).

62. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

63. 18 U.S.C. § 3575(b) (1970); 21 U.S.C. § 849(b) (1970).

64. *United States v. Stewart*, 531 F.2d 326, 332-35 (6th Cir. 1976) (noting that § 3575 does not create a distinct criminal charge but merely provides for an increase in the penalty for the offense itself).

65. *Specht v. Patterson*, 386 U.S. 605, 608 (1967) (citation omitted).

separate offense should be determined by a comparison of the nature of the aggravating circumstance and the nature of the offense, rather than by looking to the extent of aggravation permitted. Using this standard, it is clear that many of the aggravating circumstances specified in rule 421 adopted by the California Judicial Council *do* state a separate offense, at least to the same extent the Colorado Sex Offender Act did. A sentence can be aggravated if the defendant "has engaged in a pattern of violent conduct,"⁶⁶ if he has "numerous" prior convictions,⁶⁷ or if he threatened witnesses or suborned perjury.⁶⁸

The test of proportionality remains a more significant part of the equation, however. Attempting to determine whether the aggravating circumstance is characterized as a separate offense or not can quickly engage us in a label game. The real focus of our inquiry should be what is at stake for the defendant. Applying this test, we can see that the California approach of broadly defining aggravating circumstances across the board, to be applied to *all* crimes and *all* sentencing ranges, may create difficulties. Although the definitions may be precise enough in one context, they may not be sufficiently precise in another.⁶⁹

The second step in our vagueness analysis should be to determine the extent of "free play" in the definitions of aggravating circumstances, to insure that prosecutors and judges are held to ascertainable standards in applying them. When we confront an aggravating circumstance which is so broad and amorphous it could be plausibly used against *any* defendant, we face the very danger that the vagueness doctrine is designed to prevent: the prosecutor can pick and choose the defendants against whom the provision will be utilized virtually at whim.

Applying this standard to the aggravating circumstances contained in rule 321 promulgated by the California Judicial Council, we see some rather startling examples of vagueness. Under rule 421(a)(3), circumstances in aggravation include a finding that "the victim was particularly vulnerable." Every victim, of course, is "vulnerable." What makes a victim "particularly" vulnerable is left to our imagination:

66. CAL. RULES OF COURT 421(b)(1) (effective July 1, 1977).

67. *Id.* 421(b)(2).

68. *Id.* 421(a)(6).

69. The sentencing ranges to be formulated by the Federal Sentencing Commission will apparently be specifically directed to each crime. See Kennedy, *Criminal Sentencing: A Game of Chance*, 60 JUD. 208, 213-14 (1976), reprinted in 123 CONG. REC. 407, 409 (daily ed. Jan. 11, 1977).

age? sex? physical incapacity? stupidity? time of day or night? A prosecutor would need little imagination to utilize this circumstance in virtually every crime that has a victim. Rule 421(a)(8) provides for aggravation if the "planning, sophistication or professionalism with which the crime was carried out, or other facts, indicated premeditation." This would seem applicable to all but the most spontaneous of crimes. Rule 421(a)(11) allows aggravation if "the crime involved a large quantity of contraband." Frequent use of this provision can be anticipated in drug prosecutions. In defining the crime of possession with intent to distribute, at least one court has held that a provision authorizing conviction based solely on evidence of quantity without *specifying* the amount required was void for vagueness.⁷⁰ Whether a quantity is "large" should not be left to the varying subjective judgments of the prosecutors to whom the use of this provision is entrusted.

It appears, again, that attempting to define aggravating circumstances for *all* crimes, without particularization, will inevitably lead to broad and amorphous definitions which may run afoul of the constitutional prohibition against vagueness.

B. Giving Notice to the Defendant of Aggravating Circumstances to be Invoked

The California Uniform Determinate Sentencing Act as originally enacted contained a requirement that circumstances in aggravation or mitigation "shall only be considered if set forth in a motion made prior to or at the time set for sentencing."⁷¹ In an amendment adopted on the eve of the Act's effective date, the requirement of a motion was eliminated.⁷² Thus, a defendant facing sentencing may be given no advance notice that circumstances in aggravation will be asserted, much less be informed what particular circumstances will be relied upon.

The absence of notice in these provisions stands in sharp contrast to the state death penalty procedures upheld by the Supreme Court, which require that the aggravating circumstances be alleged before trial,⁷³ and the federal dangerous special offender statutes, requiring a notice be filed by the prosecuting attorney "a reasonable time before trial . . . setting out with particularity the reasons why such attorney

70. *Sharp v. Commonwealth*, 213 Va. 269, 192 S.E.2d 217 (1972).

71. Act of Sept. 20, 1976, ch. 1139, § 273, [1976] Cal. Stats. — (amended 1977).

72. Act of June 29, 1977, ch. 165, § 15, [1977] Cal. Stats. — (to be codified in CAL. PENAL CODE § 1170(b)).

73. See note 34 *supra*.

believes the defendant to be a dangerous special offender."⁷⁴ The requirement of particularity has been strictly construed by the courts applying this statute.⁷⁵

Three rationales can be offered in support of a requirement of advance notice of aggravating circumstances. First, a defendant cannot voluntarily, knowingly and intelligently enter a plea to the underlying charge unless he is fully aware of the consequences.⁷⁶ While it might be argued that the imposition of the maximum or "aggravated" sentence is a possible consequence for *every* defendant, this argument overlooks the realities of the decision to enter a plea. A defendant may be aware of the aggravating circumstances specified by Judicial Council guidelines, and enter a plea of guilty fully confident that these circumstances do not apply and that the middle sentence or range is applicable, only to learn at the time of sentencing that the judge is considering an aggravated sentence.

Secondly, the notice provides a basis for judicial review of the decision to invoke the aggravation procedure.⁷⁷ If the prosecutor is required to specify the grounds for aggravation to be invoked and the facts which will be relied upon to prove those grounds, a lengthy hearing might be avoided by allowing the judge to determine, in advance, that even if the facts are proven, the aggravated term would not be justified.

Finally, the notice serves the vital function of apprising the defendant of the case against him and enabling him to prepare a defense for the

74. 18 U.S.C. § 3575(a) (1970); 21 U.S.C. § 849(a) (1970). See *The Organized Crime Control Act: Hearings on S.30 Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 345 (March 19, 1969) (statement of Henry S. Ruth).

75. In *United States v. Kelly*, 384 F. Supp. 1394 (W.D. Mo. 1974), *aff'd*, 519 F.2d 251 (8th Cir. 1975), the court held that notice filed by the prosecution of his intention to invoke § 3575 was defective in that the notice contained nothing more than an "unsupported conclusory allegation," that defendant was dangerous within the meaning of 18 U.S.C. § 3575(f) (1970). The court suggested that a statement of the factual basis upon which the allegations rested was a necessary concomitant of proper notice. 384 F. Supp. at 1399. A similar result was reached in *United States v. Duardi*, 384 F. Supp. 856; 861, 871, 874 (W.D. Mo. 1974), *aff'd*, 529 F.2d 123 (8th Cir. 1975). See also Klein, *Extended Terms for Dangerous Offenders Under the Proposed Federal Criminal Code (S. 1): The Emerging Legislative History*, 8 LOY. CHI. L.J. 319, 323-27 (1976) [hereinafter cited as Klein].

76. *United States v. Kelly*, 384 F. Supp. 1394, 1400 (W.D. Mo. 1974), *aff'd*, 519 F.2d 251 (8th Cir. 1975); *United States v. Edwards*, 379 F. Supp. 617, 621 (M.D. Fla. 1974).

77. See *United States v. Duardi*, 384 F. Supp. 856, 860 (W.D. Mo. 1974), *aff'd*, 529 F.2d 123 (8th Cir. 1975); Klein, *supra* note 75, at 330.

hearing on the applicability of aggravating circumstances.⁷⁸ It is unrealistic to expect a defendant to respond to every possible aggravating circumstance that might be asserted, especially where a veritable catalogue of seventeen possibilities is presented.

The first rationale really raises an issue as to the validity of a plea, rather than the validity of the sentence. If a defendant who entered a plea of guilty were to receive an aggravated sentence without notice, the appropriate remedy would be to vacate the conviction and permit withdrawal of the plea, rather than merely to invalidate the sentence.⁷⁹ The second rationale is concededly non-constitutional. While the avoidance of unnecessary hearings is a laudable legislative goal, it is not compelled by the Constitution.⁸⁰ The insufficiency of a factual basis can be reviewed on appeal following a full hearing. It is the last rationale, the "apprising function," that gives rise to the most serious constitutional objections to the lack of requirements for advance notice.

Clearly, counsel is given an adversarial role to play. The new California law permits counsel to submit a statement in aggravation or mitigation "to dispute facts in the record or the probation officer's report, or to present additional facts."⁸¹ A "sentencing hearing" is provided, at which further evidence can be introduced.⁸² To expect counsel to perform this role in the absence of any advance specification of aggravating circumstances is not only unrealistic, it is basically unfair.

It might be argued that counsel's role will not be very different from that under the conventional "discretion" model, where counsel frequently discovered only at the time of sentencing that the judge was considering imposing the maximum sentence based on some unanticipated antipathy to the circumstances of the crime. But the whole object of the California reform proposals is to formalize and rationalize this exercise of judicial discretion by requiring factual findings to justify

78. Klein, *supra* note 75, at 329.

79. *United States v. Blair*, 470 F.2d 331, 339-40 (5th Cir. 1972), *cert. denied*, 411 U.S. 908 (1973).

80. See Klein, *supra* note 75, at 330-31.

81. Act of June 29, 1977, ch. 165, § 15, [1977] Cal. Stats. — (to be codified in CAL. PENAL CODE § 1170(b)).

82. *Id.* The nature of the "hearing" envisioned emerges from the Sentencing Rules promulgated by the California Judicial Council. A single hearing is to be conducted to determine whether a defendant should be placed on probation, and, if not, the length of the imprisonment term to be imposed. CAL. RULES OF COURT 433 (effective July 1, 1977). The judge may select the upper term "only if, considering the entire record of the case, including the probation officer's report, all other reports properly filed in the case and other competent evidence, circumstances in aggravation are established by a preponderance of the evidence and outweigh circumstances in mitigation." *Id.* 439(b).

the sentence. The opportunity to challenge those factual findings on appeal has little value if one has no meaningful opportunity to challenge them at the time they are made. And a meaningful challenge at the sentencing hearing demands advance notice and an opportunity to prepare.

It might also be suggested that the disclosure of the presentence report in advance of sentencing will itself function as a notice of aggravating circumstances to be relied upon. Such a suggestion could only be made by someone who has never read a presentence report. It is akin to suggesting the investigative report of a police officer can serve in lieu of an indictment. In any event, the new law allows aggravating circumstances to be found from sources other than the contents of the probation report.⁸³

C. Use and Disclosure of Presentence Reports: The Right to Confrontation

The California Uniform Determinate Sentencing Act as originally enacted provided that a finding of circumstances in aggravation could be based upon "the evidence introduced at the hearing on the motion and any evidence previously heard by the judge"⁸⁴ Apparently the absence of any reference to the presentence report was deliberate, an implicit recognition that only legally admissible evidence should be used.⁸⁵ In an amendment adopted on the eve of the Act's effective date, however, it was provided that a finding of aggravating circumstances could be based upon the court's consideration of "the record in the case, the probation officer's report, other reports including . . . [diagnostic reports prepared by the Department of Corrections] and state-

83. CAL. RULES OF COURT 439(b) (effective July 1, 1977).

84. Act of Sept. 20, 1976, ch. 1139, § 273, [1976] Cal. Stats. — (amended by Act of June 29, 1977, ch. 165, § 15, [1977] Cal. Stats. —).

85. See remarks of Judge Bruce F. Allen in California Attorneys for Criminal Justice, Statewide Criminal Law Seminar Syllabus (April 16, 1977):

Can the probation report which describes the offense be considered by the judge at the hearing? The county already paid for it and the judge already read it. If both sides stipulate, then the judge obviously can use it. However, the probation report is full of hearsay, not admissible under the Evidence Code, and SB 42 limits the hearing to "evidence introduced at the hearing on the motion and any evidence previously heard by the judge at the trial." The underlined part was included in the bill by the author, Senator Nejedly, at my request. At the same time, he agreed in writing to include the probation report, and the Ways and Means Committee adopted that amendment, but when the bill came out in print, the reference to the probation report was omitted. This unusual legislative procedure is hardly an oversight and in my ten years in the Legislature, I never before had anyone, friend or foe, back down in this fashion on an agreed and adopted amendment without notice.

Id. at 38-39 (emphasis in original).

ments in aggravation or mitigation submitted by the prosecution of the defendant, and any further evidence introduced at the sentencing hearing.”⁸⁶

These provisions raise a substantial issue in terms of the constitutional right to confrontation of witnesses: can a report be relied upon without affording the defendant an opportunity to cross-examine the sources of information utilized in the report?

Although this issue was not reached in *Gardner v. Florida*,⁸⁷ this is the battleground on which both *Williams v. New York*⁸⁸ and *Specht v. Patterson*⁸⁹ were fought. While the right to cross-examine was rejected for the discretion model in *Williams*, it was mandated as part of the “full panoply” of due process rights which the Court recognized in the context of the enhancement model of *Specht*. It can certainly be argued that the sentence aggravation procedure envisioned by California bears a closer resemblance to the enhancement model of *Specht* than to the discretion model of *Williams*; such an argument will not be dispositive, however, since the Court has explicitly abandoned the “full panoply” approach to due process since *Specht* was decided.⁹⁰ The focus of our inquiry should rather be upon the significance of cross-examination to truth finding in the context of the factual questions being resolved.⁹¹ The greatest enlightenment in resolving this inquiry can be found in the Supreme Court’s approach to parole and probation revocation proceedings. In both *Morrissey v. Brewer*⁹² and *Gagnon v. Scarpelli*,⁹³ the Court concluded due process in these settings includes the right to confront and cross-examine adverse witnesses. Parole and probation revocation, unlike sentencing under the discretion model, involves a specific factual allegation which must be proved.

This essential difference is highlighted by the contrast between *People v. Vickers*⁹⁴ and *People v. Peterson*,⁹⁵ decided seven months apart by the California Supreme Court. In *Vickers*, the court held that

86. Act of June 29, 1977, ch. 165, § 15, [1977] Cal. Stats. — (to be codified in CAL. PENAL CODE § 1170(b)).

87. 97 S. Ct. 1197 (1977). See note 35 *supra* and accompanying text.

88. 337 U.S. 241 (1949). See notes 17-20 *supra* and accompanying text.

89. 386 U.S. 605 (1967). See notes 21-26 *supra* and accompanying text.

90. *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972).

91. *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973); *Dutton v. Evans*, 400 U.S. 74, 89 (1970).

92. 408 U.S. 471, 489 (1972).

93. 411 U.S. 778, 781-82 (1973).

94. 8 Cal. 3d 451, 503 P.2d 1313, 105 Cal. Rptr. 305 (1972).

95. 9 Cal. 3d 717, 511 P.2d 1187, 108 Cal. Rptr. 835 (1973).

all the procedural protections of *Morrissey*, including the right to confront and cross-examine adverse witnesses, were fully applicable in hearings for *revocation* of probation.⁹⁶ In *Peterson*, the court concluded that a denial of the opportunity to cross-examine a witness was not a denial of due process at a hearing considering the *granting* of probation.⁹⁷ Since the granting of probation is an exercise of broad judicial discretion, which does not require any specific factual findings,⁹⁸ the *Peterson* court found support in *Williams v. New York*.⁹⁹ The *revocation* of probation, on the other hand, requires that specific factual issues be resolved. Thus, just as at a trial, the right of cross-examination must be afforded to assure the "accuracy of the truth-determining process."¹⁰⁰ The parallel between parole and probation revocation hearings and the factual determinations to be made to justify an aggravated sentence is readily apparent. In fact, one of the circumstances of aggravation recognized under the California rule is that "[t]he defendant's prior performance on probation or parole was unsatisfactory."¹⁰¹ It would certainly be incongruous to deny cross-examination to resolve this issue when aggravation of a sentence is at stake, while requiring it when revocation of probation or parole is at stake. The potential loss of liberty may be even greater in the context of sentence aggravation.

Even with respect to parole or probation revocation hearings, however, the United States Supreme Court has recognized a significant limitation upon the right of cross-examination which has not been imposed as a limitation on the right of confrontation at trial: the right can be disallowed if "the hearing officer specifically finds good cause for not allowing confrontation."¹⁰² Little guidance is available as to what might constitute "good cause" for denial of the right. On the one hand, the Court suggests the process "should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial."¹⁰³ Since the reason such evidence is excluded at a trial is that it is hearsay and the party has no opportunity to cross-examine its author, this suggests mere

96. 8 Cal. 3d at 457, 503 P.2d at 1317-18, 105 Cal. Rptr. at 309-10.

97. 9 Cal. 3d at 727, 511 P.2d at 1194-95, 108 Cal. Rptr. at 842-43.

98. *People v. Edwards*, 18 Cal. 3d 796, 557 P.2d 995, 135 Cal. Rptr. 411 (1976).

99. 9 Cal. 3d at 725-26, 511 P.2d at 1193-94, 108 Cal. Rptr. at 841-42.

100. *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973).

101. CAL. RULES OF COURT 421(b)(5) (effective July 1, 1977).

102. *Morrissey v. Brewer*, 408 U.S. 471, 489 (1972).

103. *Id.*

unavailability may be "good cause." On the other hand, the Court suggests a stricter test in delineating the circumstances when a defendant can cross-examine those who supplied adverse information at a preliminary hearing before he is returned to prison: "if the hearing officer determines that the informant would be subjected to risk of harm if his identity were disclosed, he need not be subjected to confrontation and cross-examination."¹⁰⁴ While no clear standard of "good cause" emerges, it is clear that the burden is upon the state to show specific reasons why the right must be limited. Such a showing cannot be based upon arguments which apply to parole or probation procedures in general.

The confrontation and cross-examination of witnesses permitted in sentencing hearings under the California law should be at least as great as that required in parole and probation revocation proceedings.¹⁰⁵ The routine reliance upon presentence reports apparently envisioned by the new law is clearly at odds with the standards announced in *Morrissey* and *Gagnon*. In the absence of a compelling showing of particular reasons to dispense with the right, a defendant contesting a showing of aggravating circumstances should have the right to cross-examine all adverse witnesses.

D. *Playing the Label Game: The Problem of Burden of Proof*

To understand the burden of proof issues posed by the California Uniform Determinate Sentencing Act, the fragility of the labels "element of the crime," "enhancement," and "aggravating" or "mitigating" circumstances must be comprehended. It is now axiomatic that due process in criminal proceedings requires that every "element of the crime" must be proven beyond a reasonable doubt.¹⁰⁶ At least under

104. *Id.* at 487.

105. Despite the language in *People v. Vickers*, 8 Cal. 3d 451, 457, 503 P.2d 1313, 1317-18, 105 Cal. Rptr. 305, 309-10 (1972), that probation revocation proceedings include "the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation)," police and probation reports are apparently being freely admitted in evidence at revocation hearings. In *People v. Turner*, 44 Cal. App. 3d 753, 755-56, 118 Cal. Rptr. 924, 926 (1975), the court held a police report was admissible at a probation revocation hearing, citing the language of *Morrissey*. See note 85 *supra* and accompanying text. It was further noted, however, that counsel had not requested that the witnesses quoted in the report be produced at the hearing for cross-examination. *People v. Turner*, 44 Cal. App. 3d at 756, 118 Cal. Rptr. at 926.

106. *In re Winship*, 397 U.S. 358 (1970).

the discretion model, however, this burden does not apply to factual issues at a sentencing hearing. Thus, when California defined two separate crimes of robbery, carrying a penalty of one year to life, and armed robbery, carrying a penalty of five years to life, the jury had to find beyond a reasonable doubt that the defendant was armed before he was liable for the five to life sentence. Can this result be avoided simply by defining the crime of robbery, punishable by two, three or four years, and decreeing that being armed is an "aggravating circumstance" which justifies the four year sentence?¹⁰⁷

Such legislative sleight of hand has apparently won the approval of the United States Supreme Court. In *Mullaney v. Wilbur*,¹⁰⁸ the Court held that due process requires the prosecution to prove beyond a reasonable doubt the absence of heat of passion on sudden provocation before a defendant could be convicted of murder, reasoning that absence of provocation was an essential element of the malice required for murder.¹⁰⁹ Two years later, in *Patterson v. New York*,¹¹⁰ the Court upheld a New York law which required the defendant to prove the "extreme emotional disturbance" which would result in a verdict of manslaughter rather than murder, distinguishing *Mullaney* on the ground that the New York statute made extreme emotional disturbance an affirmative defense, whereas the Maine statute construed in *Mullaney* resulted in a "presumption" of the absence of provocation which the defendant had to overcome.¹¹¹ Protesting this "label game," Justice Powell, author of the *Mullaney* opinion, dissented in *Patterson*:

With all respect, this type of constitutional adjudication is indefensibly formalistic. A limited but significant check on possible abuses in the criminal law now becomes an exercise in arid formalities. What *Winship* and *Mullaney* had sought to teach about the limits a free society places on its procedures to safeguard the liberty of its citizens becomes a rather simplistic lesson in statutory draftsmanship. Nothing in the Court's opinion prevents a legislature from applying this new learning to many of the classical elements of the crimes it punishes.¹¹²

107. While such a redefinition could reduce the burden of proof from beyond a reasonable doubt to a preponderance of the evidence, the burden would still be on the prosecution. If the label is determinative, the legislature could carry this process a step further by decreeing all robbers should receive a four year sentence unless they prove they were *not* armed, in which case a three year sentence would be imposed. By simply labeling the same fact a "mitigating" circumstance, rather than an "aggravating" circumstance, the entire burden of proof could be shifted to the defendant.

108. 421 U.S. 684 (1975).

109. *Id.* at 698-700.

110. 97 S. Ct. 2319 (1977).

111. *Id.* at 2330.

112. *Id.* at 2334 (dissenting opinion of Powell, J.).

While legislative sleight of hand may have achieved Supreme Court acceptance, a slightly different question is presented when the magic wand is placed in the hands of the prosecutor. Such appears to be one consequence of the California Uniform Determinate Sentencing Act. The Act creates a distinction between circumstances justifying "enhancement" and circumstances justifying "aggravation." Enhancement allows an additional penalty to be imposed under five circumstances, provided none of these circumstances is an element of the underlying offense:

- (1) If the defendant was armed with or uses any deadly weapon, one additional year may be imposed;¹¹³
- (2) If the defendant uses a firearm, two additional years may be imposed;¹¹⁴
- (3) If the defendant inflicts great bodily injury upon a victim, three additional years may be imposed;¹¹⁵
- (4) If a crime involves a property loss in excess of \$25,000 one additional year may be added; if the loss exceeds \$100,000, two additional years may be added;¹¹⁶
- (5) If the crime is a "violent" felony, three additional years may be added for each prior conviction of a "violent" felony.¹¹⁷

Each of these enhancements must be "pleaded and proven as provided by law," meaning proof beyond a reasonable doubt is required.¹¹⁸ As to aggravating circumstances justifying the highest of the three sentencing alternatives, the burden of proof required is apparently a preponderance of the evidence.¹¹⁹ While the same fact cannot be used for both enhancement and aggravation,¹²⁰ frequently the prosecutor can achieve the same net gain by using a fact for aggravation as could be achieved by pleading and proving enhancement. The aggravating circumstances defined in rule 421 of the Judicial Comment include *all* of the facts chargeable for purposes of enhancement.¹²¹ Thus, the requirement of proof of a fact beyond a reasonable doubt can be totally

113. Act of June 29, 1977, ch. 165, § 91, [1977] Cal. Stats. — (to be codified in CAL. PENAL CODE § 12022).

114. *Id.* § 92 (to be codified in CAL. PENAL CODE § 12022.5).

115. *Id.* § 94 (to be codified in CAL. PENAL CODE § 12022.7).

116. *Id.* § 93 (to be codified in CAL. PENAL CODE § 12022.6).

117. *Id.* § 13 (to be codified in CAL. PENAL CODE § 667.5(a)).

118. *Id.* § 17 (to be codified in CAL. PENAL CODE § 1170.1a(e)).

119. CAL. EVID. CODE § 115 (West 1966); CAL. RULES OF COURT 439(b) (effective July 1, 1977).

120. Act of June 29, 1977, ch. 165, § 15, [1977] Cal. Stats. — (to be codified in CAL. PENAL CODE § 1170(b)).

121. CAL. RULES OF COURT 421(a)(1), (a)(2), (a)(10), (b)(3) (effective July 1, 1977).

avoided by the simple expedient of using the fact for aggravation rather than enhancement.

In terms of due process,¹²² one can respond to this situation in two ways. While it can be argued that the burden of proof for aggravation should be the same as that imposed for enhancement—beyond a reasonable doubt—it might with equal plausibility be suggested that the burden of proof for enhancement is greater than the Constitution requires, and that a mere preponderance of the evidence would suffice. One could cite at least one significant example. The dangerous special offender provisions of federal law allow enhancement of a sentence by as much as twenty-five years upon a factual finding of "dangerousness," yet permit such a finding to be made "by a preponderance of the information."¹²³ This example has yet to receive a full constitutional challenge on the issue of burden of proof, however. By contrast, every death penalty statute upheld by the United States Supreme Court has required proof of aggravating circumstances beyond a reasonable doubt.¹²⁴

The burden of proof to be imposed should not depend upon the label attached to the proceeding. Rather, the standard of proof required by due process should depend upon the consequences of an erroneous factual determination.¹²⁵ An erroneous factual finding in the context of the California Uniform Determinate Sentencing Act has dire consequences for a defendant, increasing the amount of time he must spend in prison by as much as fifty per cent. While the Court in *In re Winship*¹²⁶ premised the requirement of proof beyond a reasonable doubt upon *both* the possible loss of liberty and the accompanying stigma of conviction,¹²⁷ these results can also be seen to flow from aggravation of a sentence. Since the factual premise upon which aggravation may be based is made a part of the record, the defendant may be "stigmatized" to the same extent a juvenile is stigmatized by delinquency proceedings, a sexual psychopath, by mentally disordered sex offender proceedings,¹²⁸ or a narcotics addict, by civil commitment proceed-

122. Apart from due process, the option of enchantment vs. aggravation raises a substantial issue of equal protection of the laws, which is discussed in the section of this article dealing with the right to a jury trial. See notes 149-51 *infra* and accompanying text.

123. 18 U.S.C. § 3575(b) (1970); 21 U.S.C. § 849(b) (1970).

124. See note 32 *supra* and accompanying text.

125. See *In re Winship*, 397 U.S. 358, 363-64 (1970).

126. 397 U.S. 358 (1970).

127. *Id.* at 363.

128. *People v. Burnick*, 14 Cal. 3d 306, 329, 535 P.2d 352, 367-68, 121 Cal. Rptr. 488, 503-04 (1975).

ings.¹²⁹ Indeed, the factual basis for sentence aggravation may be based on a finding the defendant is "a serious danger to society."¹³⁰ To argue that the loss of liberty or stigmatization is of less consequence because the defendant has already been convicted of an underlying crime overlooks the difference between the factual issues involved in the underlying crime and the factual issues involved in the finding of aggravation. In holding that a finding a defendant is a mentally disordered sex offender must be established by proof beyond a reasonable doubt, the California Supreme Court concluded that "the fact that the issues at the criminal trial were judged by the reasonable doubt standard has no bearing on how the distinct issues at the mentally disordered sex offender proceeding must be proved."¹³¹ This suggests a distinction might be made between aggravating circumstances based on facts relating to the crime, and aggravating circumstances relating to the defendant. Since a finding of facts related to the crime might involve no greater stigmatization than the conviction itself, a small increment in the sentence might be justified without the necessity of proof beyond a reasonable doubt.

Where the aggravating fact is itself an independent crime, the necessity of proof beyond a reasonable doubt is even clearer. Even in the context of the traditional discretion model, courts have held that a more severe sentence cannot be imposed on the basis that the defendant lied in his testimony during the trial, since this punishes the defendant for the separate crime of perjury without all of the rights of a trial on that charge.¹³² From this standpoint, the inclusion of the following aggravating circumstance in the Judicial Council catalogue raises a serious question: "[t]he defendant threatened witnesses, unlawfully prevented or dissuaded witnesses from testifying, suborned perjury, or in any other way illegally interfered with the judicial process."¹³³ Each of these acts is punishable as the separate crimes of subornation of perjury,¹³⁴ preventing or dissuading attendance of witnesses,¹³⁵ or conspiring to obstruct justice.¹³⁶

129. *People v. Thomas*, 19 Cal. 3d 630, 640-41, 566 P.2d 228, 232-34, 139 Cal. Rptr. 594, 599-600 (1977).

130. CAL. RULES OF COURT 421(b)(1) (effective July 1, 1977).

131. *People v. Burnick*, 14 Cal. 3d 329, 330, 535 P.2d 352, 368, 121 Cal. Rptr. 488, 504 (1975).

132. *See United States v. Grayson*, 550 F.2d 103, 105-08 (3d Cir. 1976).

133. CAL. RULES OF COURT 421(a)(6) (effective July 1, 1977).

134. CAL. PENAL CODE § 127 (West 1970).

135. *Id.* § 136 (West Supp. 1977).

136. *Id.* § 182.

E. The Right to Jury Trial

The California Uniform Determinate Sentencing Act does not provide for a jury determination of the facts utilized for aggravation of a sentence. To argue that due process requires a jury determination in these circumstances, however, would require us to ignore the strong parallel to other contexts in which the United States Supreme Court has upheld the denial of a right to jury trial, even though other procedural rights, including burden of proof beyond a reasonable doubt, were required.

In *McKeiver v. Pennsylvania*,¹³⁷ the Court declined to require jury trials in juvenile court proceedings. Many of the practical considerations which buttressed this ruling are equally applicable to sentencing proceedings. Although stated as "different" reasons, the Court in essence repeatedly gave the same reason for concluding a jury trial was not a constitutional requirement—that is, the formality this would inject into the proceeding: "[i]f the jury system were to be injected into the juvenile court system as a matter of right, it would bring with it into that system the traditional delay, the formality, and the clamor of the adversary system and, possibly the public trial."¹³⁸ Much the same argument could be made with respect to sentencing proceedings, even under the enhancement model. Substantial delays would be added to an already overburdened system, at little gain in terms of the reliability of the fact finding function.

More recently, the Court has intimated that due process does not require a jury determination of aggravating facts utilized to impose a death penalty. In upholding the Florida death penalty statute in *Proffitt v. Florida*,¹³⁹ the Court noted that the sentence is ultimately determined by the trial judge rather than the jury, concluding that this may lead to ever greater consistency in the imposition of capital punishment than if the issue were entrusted to less experienced juries.¹⁴⁰ The Court was also impressed by the appellate review system, under which the evidence of aggravating and mitigating circumstances is reviewed and reweighed to determine independently whether the sentence is warranted.¹⁴¹ If imposition of the ultimate penalty of death is permissible without a jury determination of aggravating facts, one is

137. 403 U.S. 528 (1971).

138. *Id.* at 550.

139. 428 U.S. 242 (1976).

140. *Id.* at 252 (opinion of Stewart, J.).

141. *Id.* at 250-51.

hard put to argue such a procedure is required for the imposition of lesser penalties, especially since the protections alluded to by the Court in *Proffitt* are also available under the new California Act, which requires the judge to make explicit factual findings which are subject to appellate review.¹⁴²

The guarantees of due process¹⁴³ and jury trial¹⁴⁴ contained in the California Constitution, of course, may be interpreted more expansively than the corresponding federal provisions. However, the California Supreme Court has declined to utilize the California Constitution as a basis to distinguish *McKeiver*, refusing to recognize a right to jury trial in juvenile court cases.¹⁴⁵ The issue will not be presented with respect to California's death penalty, since a right to jury determination of aggravating circumstances is specifically recognized in the statute.¹⁴⁶ But the California Constitution was relied upon to recognize a right to a unanimous jury verdict in commitment proceedings under both mentally disordered sex offender proceedings¹⁴⁷ and the commitment of narcotics addicts.¹⁴⁸ A plausible argument can certainly be made that aggravation hearings present a close parallel to these cases.

Even if a jury trial is not held to be required by the due process clause of the federal or state constitutions, however, an argument can certainly be made that a jury trial is required by the constitutional right to equal protection of the laws. As previously noted in the discussion of burden of proof, the same facts may be relied upon for either enhancement or aggravation. If used for enhancement, the facts must be pleaded and proved to the trier of fact. Thus, if the enhancement route is used, the defendant is afforded a jury trial. If the aggravation route is used, a jury trial is denied.

This choice of procedures is analogous to that presented to the Supreme Court in *Humphrey v. Cady*.¹⁴⁹ In *Humphrey*, the petitioner

142. Act of June 29, 1977, ch. 165, § 15, [1977] Cal. Stats. — (to be codified in CAL. PENAL CODE § 1170(b)).

143. CAL. CONST. art. I, § 7, subd. (a).

144. *Id.* § 16.

145. *People v. Superior Court (Carl W.)*, 15 Cal. 3d 271, 274, 539 P.2d 807, 809, 124 Cal. Rptr. 47, 49 (1975). *Cf. Kirkpatrick v. Clarence B.*, 37 Cal. App. 3d 676, 679, 112 Cal. Rptr. 474, 475 (1974) (noting that constitutional right to jury trial not extended to juvenile court proceedings).

146. Act of Aug. 11, 1977, ch. 316, § 12, [1977] Cal. Stats. — (to be codified in CAL. PENAL CODE § 190.4(a)).

147. *People v. Feagley*, 14 Cal. 3d 338, 350, 535 P.2d 373, 380, 121 Cal. Rptr. 509, 516 (1975).

148. *People v. Thomas*, 19 Cal. 3d 630, 638-41, 566 P.2d 228, 232-34, 139 Cal. Rptr. 594, 598-600 (1977).

149. 405 U.S. 504 (1972).

had been committed under the Wisconsin Sex Crimes Act, which did not provide for a jury trial, even though the procedure for commitment under the general Mental Health Act did grant a right to jury trial. The Court observed that the two acts were not mutually exclusive and remanded for a full evidentiary hearing, noting:

The equal protection claim would seem to be especially persuasive if it develops on remand that petitioner was deprived of a jury determination, or of other procedural protections merely by the arbitrary decision of the State to seek his commitment under one statute rather than the other.¹⁵⁰

Similar reasoning was adopted by the California Supreme Court in holding that an unanimous jury verdict was required for commitment of mentally disordered sex offenders since commitment of mentally disordered persons under the Lanterman-Petris-Short Act required jury unanimity.¹⁵¹ The availability of a jury trial should not depend upon whether the prosecutor has chosen to utilize proceedings labeled "enhancement" or proceedings labeled "aggravation." Thus, at least where aggravation is sought on the grounds specified in Judicial Council rule 421(a)(1), (2), (10) or 421(b)(3), the defendant should have a right to a jury determination of the facts, with proof beyond a reasonable doubt.

F. Appellate Review: The Need for Findings

While there is no recognized constitutional right to appellate review of a judgment of conviction, much less of a sentence, where appellate remedies *are* made available by statute, due process requires that "there . . . be findings adequate to make meaningful any appeal that is allowed."¹⁵² The absence of any right to appellate review has rendered findings unnecessary under the traditional discretion model of sentencing,¹⁵³ with rare exceptions.¹⁵⁴

The California Uniform Determinate Sentencing Act makes no specific reference to appellate review, but does require that the sentencing judge set forth on the record *both* "the facts and reasons for imposing the upper or lower term," *and* the facts and reasons for his

150. *Id.* at 512.

151. *People v. Feagley*, 14 Cal. 3d 338, 352, 535 P.2d 373, 381-82, 121 Cal. Rptr. 509, 517-18 (1975).

152. *Specht v. Patterson*, 386 U.S. 605, 610 (1967).

153. *United States v. Thompson*, 541 F.2d 794 (9th Cir. 1976); *United States v. Carden*, 428 F.2d 1116 (8th Cir. 1970).

154. *See, e.g., United States v. Capriola*, 537 F.2d 319 (9th Cir. 1976).

sentence choice.¹⁵⁵ These determinations will be reviewable by virtue of preexisting Penal Code provisions permitting a defendant to appeal from a sentence.¹⁵⁶ While these provisions have been interpreted to limit the scope of appellate review to correcting errors of law or an abuse of discretion,¹⁵⁷ an erroneous finding of aggravation based on insufficient evidence would certainly be a reviewable error of law, as would a failure to find mitigation where evidence was sufficient. The reviewing court could itself reduce the sentence or remand the case for resentencing.¹⁵⁸ There are no provisions allowing the prosecutor to appeal a sentence, however, so an erroneous finding of mitigation or failure to find aggravation cannot be challenged on appeal.

Factual findings will ordinarily be made in terms of the specific circumstances of aggravation specified in rule 421.¹⁵⁹ Since it can be anticipated that the prosecutor will frequently allege numerous aggravating circumstances, the reviewing court will frequently face a dilemma where more than one aggravating circumstance was found. If one aggravating circumstance is found to be insufficient, must an aggravated sentence be set aside if there are *other* aggravating circumstances which *were* sufficiently proven? The answer is apparently yes, since a finding of some or even all of the alleged circumstances of aggravation does not require that the upper term be imposed.¹⁶⁰ Thus, a remand would be necessary for an exercise of discretion in view of the fact that even one aggravating circumstance of several was not sufficiently proven. This result might be avoided, however, by an explicit statement of reasons. If, for example, the sentencing judge finds three aggravating circumstances, and states that any one of them would induce him to impose the aggravated sentence, the aggravated sentence need not be set aside unless all three circumstances are found to be unsupported by sufficient evidence.

155. Act of June 29, 1977, ch. 165, § 15, [1977] Cal. Stats. — (to be codified in CAL. PENAL CODE § 1170(b), (c)).

Apparently, this requirement would include a statement of reasons for the denial of probation. Cf. *People v. Edwards*, 18 Cal. 3d 796, 805, 557 P.2d 995, 1002, 135 Cal. Rptr. 411, 418 (1976), where the California Supreme Court declined to exercise its supervisory power to require a statement of reasons for denial of probation.

156. CAL. PENAL CODE §§ 1237, 1259-1260 (West 1970).

157. *People v. Giminez*, 14 Cal. 3d 68, 71-72, 534 P.2d 65, 67, 120 Cal. Rptr. 577, 579 (1975); *People v. Odle*, 37 Cal. 2d 52, 58, 230 P.2d 345, 350 (1951); *People v. Lewis*, 187 Cal. App. 2d 373, 377, 9 Cal. Rptr. 659, 662 (1960).

158. CAL. PENAL CODE § 1260 (West 1970).

159. CAL. RULES OF COURT 439(c) (effective July 1, 1977).

160. *Id.* 439(d).

*G. Applicability of the Exclusionary Rules
to Sentencing*

While the right to exclude illegally obtained evidence is embodied in due process, it is a right subject to a list of limitations and exceptions which seems to grow with each passing term of the Supreme Court. The Court has permitted a number of "collateral uses" of illegally obtained evidence on the theory that suppression for these uses would not further the rule's purpose of deterring official lawlessness.¹⁶¹ While the United States Supreme Court has yet to rule on the question, among the collateral uses permitted by many lower courts is the consideration of an appropriate sentence.¹⁶²

It is worth a moment's reflection, however, to ask whether the same result should follow in the context of the factual findings required for aggravation under the California Uniform Determinate Sentence Act. If a defendant were on trial for armed robbery, the gun allegedly used in the robbery would certainly be suppressed at trial if it were illegally seized. Should the result be different where the defendant has been convicted of robbery, and the illegally seized gun is offered as evidence to aggravate the sentence by showing the defendant was armed?

The rationale relied upon by those courts allowing illegally obtained evidence to be admitted at the time of sentence is that applying the exclusionary rule at sentencing would not add in any significant way to the deterrent effect of the rule: "[i]t is quite unlikely that law enforcement officials conduct illegal electronic auditing to build up an inventory of information for sentencing purposes, although the evidence would be inadmissible on the issue of guilt."¹⁶³ This assumption may have some validity in the context of evidence not directly related to the underlying crime. Significantly, each of the cases admitting unlawfully

161. *See, e.g.*, *United States v. Janis*, 428 U.S. 433, 447-54 (evidence obtained by state law enforcement officer under defective warrant held admissible in federal civil tax proceeding); *Oregon v. Hass*, 420 U.S. 714, 722 (1975) (inculpatory statements made by defendant after receiving full advisement of rights but before calling lawyer held admissible solely for impeachment); *United States v. Calandra*, 414 U.S. 338, 351 (1974) (witness testifying before grand jury may not refuse to answer questions on ground they are based on illegally obtained evidence); *Harris v. New York*, 401 U.S. 222, 225 (1971) (illegally obtained statements of defendant held admissible solely for impeachment).

162. *United States v. Patrick*, 542 F.2d 381, 391-92 (7th Cir. 1976); *United States v. Vandemark*, 522 F.2d 1019, 1022, 1025 (9th Cir. 1975); *United States v. Schipani*, 435 F.2d 26, 28 (2d Cir. 1970); *People v. Peterson*, 9 Cal. 3d 717, 725-26, 511 P.2d 1187, 1193-94, 108 Cal. Rptr. 835, 841-42 (1973); *People v. Hayko*, 7 Cal. App. 3d 604, 610, 86 Cal. Rptr. 726, 730 (1970).

163. *United States v. Schipani*, 435 F.2d 26, 28 (2d Cir. 1970).

seized evidence at the time of sentencing dealt with evidence of unrelated criminal activity offered to show the character of the defendant.¹⁶⁴ Where the unlawfully seized evidence related directly to the circumstances of the underlying crime, such as a confession disclosing details of the crime, courts have been more reluctant to consider the evidence for purposes of sentencing.¹⁶⁵

This distinction assumes even greater significance where the illegally obtained evidence is used to aggravate a sentence. A police officer is highly motivated to obtain evidence which will elevate the degree of the crime. For example, a homicide detective who has evidence the defendant committed a murder will certainly seek evidence of premeditation with diligence, to justify a conviction of first degree murder. To argue this motivation will somehow be diminished because premeditation is no longer an element of the crime but has been classified as an aggravating fact is, of course, totally specious. The catalogue of facts which serve to aggravate a sentence will be well known to every police officer, and gathering evidence of those facts will be a vital part of every police investigation. Thus, the deterrent purpose of the exclusionary rule will be well served by applying it to evidence offered to prove aggravating circumstances of the crime at the time of sentencing.

Where the aggravating facts relate to the character of the defendant, however, a different result can be justified. Such evidence may have been sought in an independent investigation for a different purpose, and the purpose of the exclusionary rule would be little served by suppressing the evidence for an unanticipated use.

One final note must be added with respect to proof of facts that can be alternatively used for enhancement or aggravation under the California law. If pleaded and proved as enhancement, the exclusionary rules would most certainly apply. If the exclusionary rule were not applied to hearings on aggravation, this would place the availability of the exclusionary rule in the hands of the prosecutor, raising the equal protection problem already discussed in previous sections. But more importantly, the police officer seizing the evidence has no idea whether it will be used for enhancement or aggravation. To exclude the evidence in one case and admit it in the other on grounds there is some difference in the deterrent effect upon police officers is to engage in a fiction worthy of the brothers Grimm.

164. See cases cited note 162 *supra*.

165. *United States ex rel. Brown v. Rundle*, 417 F.2d 282, 284-85 (3d Cir. 1969); *United States ex rel. Rivers v. Myers*, 384 F.2d 737, 742-43 (3d Cir. 1967); *United States ex rel. Cleveland v. Casscles*, 354 F. Supp. 114, 118-19 (S.D.N.Y. 1973).

IV. CONCLUSION

While the California Uniform Determinate Sentencing Act may achieve greater consistency in sentencing, this result cannot be attained at the expense of the procedural guarantees of due process. It appears that the last minute "tinkering" with the statute creates serious constitutional problems in terms of denying a defendant the right to notice and an opportunity to confront and cross-examine witnesses. The "aggravating circumstances" formulated by the Judicial Council also suffer from excessive vagueness in several respects. The option of proceeding in the form of "enhancement" or "aggravation" raises a substantial equal protection claim to proof beyond a reasonable doubt and a jury trial in aggravation proceedings. Finally, the exclusionary rules will, in some cases, require the suppressing of evidence relied upon to show aggravation. My own prediction is that the inevitable injection of all of these procedural rights into the sentencing process will render the "aggravation" procedure a useless dead letter which will seldom be invoked. As a practical matter, judges will have a choice of only the middle term or the lower term. Thus, even less discretion will be available to sentencing judges than the Uniform Determinate Sentencing Act envisioned.